disgusted by the hardship it worked in many cases, has discarded it. There are only two cases upon the subject in Kentucky, and it may with safety be assumed that when a hard case arises for the decision of the court it will follow New York's example. The trend of modern cases has been away from the Massachusetts rule, and one jurisdiction after another has adopted the Pennsylvania view. It has ever been the tendency of the common law to pattern its rules according to the changing necessities of society and weed out those which are found to work inequity. Even the Massachusetts courts have moderated their original holding. The rule is too firmly planted in some states to be changed by anything but legislative enactment. May it remain confined to those states and not spread elsewhere to defeat the intent of testators and deprive widows of their rightful legacies.

VERIFICATION OF AFFIDAVIT OR INFORMATION IN CRIMINAL CONTEMPT PROCEEDINGS.—The peculiar nature of the offense places the procedure in contempt cases in a class of its own. In proceedings for contempt the distinction between direct and constructive contempt is quite obvious, the mere mention of the distinction being a sufficient explanation.[1] Direct contempt consists of acts done in the presence of the court, which may be punished summarily, without the formalities incident to the proceedings for contempt committed out of the presence of the court, the latter possessing characteristics of an ordinary trial. Constructive contempts are usually instituted upon affidavit or information setting forth the alleged contempt, and it seems well settled by the authorities that a mere statement charging the contempt is insufficient. The purpose of the affidavit is to inform the defendant of the charge, and is similar in its nature to a criminal information. Whether this affidavit must be upon personal knowledge of the affiant or is sufficient if upon information and belief is the question to be discussed.

In the recent case of *Creekmore* v. *United States* (C. C. A.), 237 Fed. 743, the defendant was found guilty of contempt of court on an information verified by a United States district attorney to the effect that the facts stated were true and correct upon information and belief, the offense being specifically and particularly charged in detail. The Circuit Court of Appeals (8th Circuit), after reviewing all the authorities, held that the information was sufficient, even though not upon the personal knowledge of the affiant. It seems to be the general opinion of the text-writers throughout the United States that an affidavit upon information and belief upon which to base constructive contempt proceedings is wholly insufficient, and the court will not acquire

[1] For a discussion of principles governing proceedings for civil contempt as distinguished from criminal contempt, see 2 VA. LAW REV. 265.

jurisdiction of the case. Whether such a dogmatic rule will stand the test of reason and principle and authority is quite doubtful.[2] The decisions in the various jurisdictions where the point has arisen are conflicting and confusing.[3]

The general statute relating to contempt usually provides that the proceedings shall be instituted by affidavit. Upon an analysis of the form of the affidavit or information in contempt proceedings, one will especially note two parts: first, the accusation or charging part, where the contempt is set out in detail; second, the verification of the affidavit.[4] If the charging part contains a specific and particular accusation and is verified as upon personal knowledge, no question arises, all courts agreeing that jurisdiction will attach.[5] On the other hand, if both the accusation and the verification are upon information and belief, the authorities are in hopeless conflict as to the sufficiency.[6] A third case may be mentioned, where the charging part of the affidavit is stated in particular terms but the affiant verifies the facts upon information and belief. The case mentioned above presents these circumstances. Some of the authorities do not seem to have considered this situation separately, but classify it as an affidavit upon information and belief. And this seems correct and the distinction immaterial in so far as the view is maintained that an affidavit *verified* upon information and belief is an *affidavit* upon information and belief and therefore insufficient to confer jurisdiction upon the court. But in jurisdictions where it is held that the requirement of an "affidavit" is satisfied if the facts be stated positively, even though merely verified upon information and belief, the distinction becomes important.[7]

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[2] The question seems to have been directly before the courts in a very few cases, and most of the authority is in the nature of *dictum*.

[3] In reviewing the authorities it is apparent that a number of the courts in ruling on the practice in the particular jurisdiction have ignored this, consequently leaving some doubt as to the weight of the decision.

[4] And the mere fact that some of the allegations or statements made in the affidavit are upon information and belief is immaterial, if the part upon personal knowledge is sufficient to warrant the proceedings. See Davidson *v.* Munsey, 28 Utah 181, 80 Pac. 743; State *v.* Harris, 14 N. D. 501, 105 N. W. 621.

[5] See cases cited in note 7. But see also Ludden *v.* State, 31 Neb. 429, 48 N. W. 61; Herdman *v.* State, 54 Neb. 626, 74 N. W. 1097. In Freeman *v.* City of Huron, 8 S. D. 435, 66 N. W. 928, an affidavit alleging material facts on information and belief was held not to give the court jurisdiction. But see Poindexter *v.* State (Ark.), 159 S. W. 197, 46 L. R. A. (N. S.) 517 See also State *v.* Conn. 37 Or. 596. 62 Pac. 289; In re Nickell, 47 Kan. 734, 28 Pac. 1096, 27 Am. St. Rep. 315; Snyder *v.* State, 151 Ind. 553, 52 N. E. 152. In a number of cases there was no affidavit or statement upon which to base the contempt proceedings. See Ex parte Landry, 65 Tex. Crim. Rep. 440, 144 S. W. 962.

[6] Emery *v.* State, 78 Neb. 547, 111 N. W. 374, 9 L. R. A. (N. S.) 1124.

[7] Emery *v.* State, *supra*. See State *v.* District Court, 37 Mont. 590, 97 Pac. 1032; Jordan *v.* Cicruit Court, 28 Iowa 177, 28 N. W. 548. In State *v.* Newton, 16 N. D. 151, 112 N. W. 52, 14 Ann. Cas. 1039, the charging part of the affidavit was upon information and belief, and was held to be insufficient. In the dissenting opinion it was said, "It is true that in some states the courts have expressly held that an affidavit on which

The purpose of requiring an affidavit upon personal knowledge is to protect the accused from false and fictitious charges. But the reason is confined to complaints by individuals, and does not apply to public prosecutors. It is the duty of the latter to prosecute all offenses against the people or the state where in his opinion the evidence is sufficient, and it should not be presumed that he will violate this office by unjustified prosecutions in contempt proceedings. It is often impossible for the prosecuting attorney to obtain affidavits upon personal knowledge sufficient to connect all the facts of the crime, and certainly he should not be required to know personally all the details of every crime he seeks to prosecute. A contrary doctrine would seriously hamper the administration of justice. Thus, it would seem that a verification of an affidavit or information by a prosecuting attorney upon information and belief would be sufficient.[8] Though it may not be sufficient to warrant conviction, there is no reason why jurisdiction to try the case would not attach as in other criminal cases.[9] The purpose of the affidavit is to bring the matter before the court and serve as an accusation to the defendant. And there seems to be no good reason why the proceedings based upon an affidavit of an individual to the court or prosecuting attorney would not also be sufficient, even though only upon information and belief. But here again the requirement that the facts should be stated in positive terms should not be lost sight of. This seems merely to follow the practice in the institution of criminal proceedings—that the facts must be specifically charged so as to inform the accused of the nature of the offense in order that he may defend himself. In the principal case, the charging part of the affidavit was stated in specific terms; though the verification was upon information and belief of the district attorney, and the court held the affidavit sufficient.

Although in some states it may be expressly provided by statute that the affidavit be upon personal knowledge of the affiant, no such federal statute exists. It should be noted that in the principal case no warrant of arrest was issued, but merely a rule to show cause, which is the usual method of procedure in contempt cases.

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to base contempt proceedings is insufficient, if made on 'information and belief'; but generally there is little or no discussion of the question in the opinion * * *." See also the dissenting opinion in Belangee *v.* State, 97 Neb. 184, 149 N. W. 415. Certainly, after full hearing and conviction, the judgment is not void because some material allegations in the affidavit are based upon information and belief. In re Acock, 84 Cal. 50, 23 Pac. 1029.

[8] "It is not expressly provided that the affiant show that he had personal knowledge of the facts, and the only action of the court which can be based upon the affidavit is of a personal character; the evidence upon which the defendant is to be adjudged guilty, if at all, being still to be adduced." Jordan *v.* Circuit Court, *supra.*

[9] See Jordan *v.* Circuit Court, *supra;* State *v.* District Court, *supra.* See also In re Acock, *supra.* But see the qualifying opinion in Ex parte Landry, *supra.* In holding the affidavit insufficient the court, in Belangee *v.* State, *supra,* said that there is no distinction between an affidavit of a prosecuting attorney and that of an individual.